IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 15 OF 1995

1. Nana Bhimrao Chavan]
age 19 yrs. r/o Alsunde]
Tal. Karmala, Dist.]
Solapur.]
]
2. Vilas Digamber Kamble,]
Age 25 yrs. r/o Karmala]
Dist. Solapur. (both at]
present in Yeroda Central]
Prison, Pune.)]..Appellants/
Accused nos.2 & 3

Versus

The State of Maharashtra]..Respondent

....

Mr.T.E.Mane, Advocate for Appellants
Mr.A.S.Shitole, A.P.P. for the Respondent-State

....

CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : SEPTEMBER 9, 2004

ORAL JUDGMENT:

1. Through this appeal, the appellants -original accused nos.2 and 3 challenge the judgment and order dated 6th December, 1994 passed by the learned Additional Sessions Judge, Solapur in Sessions Case No. 17 of 1994. By the said judgment and order, the appellant no.1 Nana and appellant no.2 Vilas

have been convicted for the offence under Sections 366-A and 109 of IPC and sentenced to undergo R.I. for three years each and to pay a fine of Rs.500/- each indefault to suffer R.I. for one month. The appellant no.2 Vilas has further been convicted for the offence under Section 376 of IPC and sentenced to suffer R.I. for three years and to pay a fine of Rs.500/- in default R.I. for one month. He has also been convicted for the offence under Section 392 of IPC and sentenced to suffer R.I. for three years and to pay a fine of rs.500/- in default R.I. for one month. All the sentences were directed to run concurrently.

. It may be stated here that the appellants along with three other accused were facing trial and the other three accused i.e. accused no.1 Chhaya, accused no.4 Meena and accused no.5 Kishan have been acquitted of all the charges levelled against them.

2. Briefly stated the prosecution case is as under:

. The prosecutrix P.W.1 Vijaya Tupe was residing with her husband Siddheshwar Tupe, father-in-law P.W.6 Bhiku Tupe and other family members at village

Alsunde, District Solapur. All the five original accused were also residents of Alsunde. Original accused no.1 Chhaya Tupe was residing next to her house. Original accused no.5 Kishan was visiting the house of accused no.1 Chhaya. The appellant no.1 Nana is the brother of original accused no.4 Meena and appellant no.2 Vilas is the husband of accused no.4 Meena.

3. The prosecutrix used to fetch water from the tube well in the village. At that time, appellant no.1 Nana used to tease her. Thereafter, appellant no.1 Nana called the prosecutrix to his house to introduce her to his sister Meena (original accused no.4). Thereafter the prosecutrix used to visit the house of Nana. The appellant Nana had forcible sexual intercourse with the prosecutrix three to four times in his house. The original accused no.5 Kishan learnt about this fact. Hence, he sent the original accused no.1 Chhaya to the house of prosecutrix and called the prosecutrix to the house of Chhaya. When the prosecutrix went to the house of Chhaya, original accused no.5 Kishan told the prosecutrix that he had learnt about the illicit relations between her and Nana and he asked the

prosecutrix to allow him to have illicit relations with her under the threat that if she did not allow him to have sexual intercourse with her, he would inform about her illicit relations with Nana to her husband and in-laws. Thereafter, accused no.5 Kishan had intercourse with the prosecutrix about 3 to 4 times in the house of original accused no.1 Chhaya.

4. It is the case of the prosecution that when prosecutrix went to the house of Nana, he expressed his desire to marry her. Nana told the prosecutrix that her husband Siddheshwar is an agriculturist whereas Nana will maintain her happily with honour at Pune as he is likely to get a job there and also a quarter. On 2nd November, 1993 at about 7.30 p.m. Nana called the prosecutrix to his house and asked her to come to his house on the next day in the morning at about 5.00 a.m. Nana threatened her that if she would not come, he would drag her from her house in the presence of her family members.

. On the next day in the morning at about 5 a.m. the prosecutrix went to the house of appellant no.1 Nana. Appellant Nana then asked appellant no.2

Vilas to take out bicycle. Appellant Nana then asked prosecutrix to go along with appellant no.2 Vilas and told her that he will come after 2 to 3 days. The prosecutrix then went with appellant no.2 Vilas. Appellant no.2 Vilas then carried the prosecutrix double-seat on the bicycle to Karmala.

. At Karmala, appellant Vilas asked the prosecutrix to wait near Naka and he went to bring a bag. When he came back, he had bicycle in his hand and he asked prosecutrix to follow him. The prosecutrix followed him on foot for about ten minutes. Again appellant Vilas asked her to wait thereafter, Vilas and prosecutrix went in a jeep to village Pothare. From village Pothare, they went to village Jamkhed and from Jamkhed they went to Ahmednagar. At Ahmednagar, Vilas asked prosecutrix to wait and he went to meet some persons. After sometime, he returned back and took her to cinema theatre to see a movie. Thereafter, both went in a jeep to village Ashti. At village Ashti, appellant Vilas told the prosecutrix to wait at the S.T.stand and went to find some accommodation. He returned after 2 to 3 hours stating that no accommodation was available. Hence, they went to Karmala. It was around

midnight. Appellant Vilas took the prosecutrix to a room and asked her to stay in that room for the night. During that night, appellant Vilas committed rape on prosecutrix. Next day in the morning at about 6 a.m. appellant Vilas awoke the prosecutrix and thereafter he took her on foot for about 10 to 15 minutes to the house of one Bholenath and thereafter, to the house of one Langdya. Appellant Vilas kept her in the house of Langdya and Vilas went to his house. The prosecutrix stayed in the house of Langdya for about two days. Thereafter, appellant Vilas came to her and told her that he had no money to go to Pune and asked her to give her gold earrings. The prosecutrix then gave her gold earrings to Vilas. Vilas then sold the gold earrings and brought Rs.800/-. Vilas then went to his house. He asked the prosecutrix to keep herself ready for going to Pune in the evening. Thereafter, the prosecutrix learnt that Police had arrested Vilas.

. After sometime, Bharat the brother of appellant Vilas came to the house of Langdya and the prosecutrix was taken to police chowky. In the police chowky she met her husband and in laws and

she narrated the incident to them. She has produced her petticoat (Article no.2), bed-sheet (article no.1) before the police.

5. The cousin brother-in-law P.W.7 Ishwar Tupe of the prosecutrix lodged his complaint against the appellants and other accused persons on 7th November, 1993 (Exhibit 38). Thereafter, the investigation was carried out in the usual manner. After completion of investigation, the charge sheet came to be filed.

6. In due course, the case was committed to the Court of Sessions where the original accused no.1 Chhaya came to be charged under Sections 376 and 109 of IPC, appellant no.2 Nana was charged for the offence under Sections 376, 366-A and 109 of IPC. Appellant no.2 i.e. original accused no.3 Vilas was charged for the offence punishable under Section 366A, 109, 376 and 392 of IPC. Original accused no.4 Meena came to be charged for the offence under Sections 366-A and 109 of IPC and original accused no.5 Kishan came to be charged for the offence punishable under Sections 376, 109 and 504 of IPC. All the accused pleaded not guilty and claimed to be

tried. The defence of the accused persons is that the prosecutrix Vijaya Tupe was not liking her husband as she was not getting sexual satisfaction from him and therefore, she left the house of her husband on her own accord. It is also the defence of the accused persons that due to village politics, they have been falsely involved in the case. After the trial, as stated earlier, original accused nos.1, 4 and 5 came to be acquitted of all the charges. Appellant no.1 Nana came to be acquitted of the offence under Section 376 of IPC. However, he was convicted for the offence under Sections 366-A and 109 of IPC and appellant no.2 Vilas i.e. original accused no.3 was convicted for the offence under Sections 376, 366-A, 392 and 109 of IPC and hence, this appeal.

7. I have heard Shri.T.E.Mane, the learned advocate appearing for the appellants and Shri.A.S.Shitole, the learned A.P.P. for the Respondent-State. I have perused the entire material on record as well as the judgment and order of the learned Sessions Judge. After utmost circumspection, I have reached the conclusion that this appeal deserves to be allowed.

8. The conviction of the the appellants is based on the evidence of prosecutrix P.W.1 Vijaya Tupe. For the reasons stated hereinafter, in my view, the evidence of prosecutrix cannot be said to be beyond reproach. I have set out the prosecution story in para no.2 of this judgment on the basis of recitals contained in the examination in chief of the prosecutrix and hence, I do not wish to over burden this judgment by repeating the same. As far as the age of the prosecutrix is concerned, from the evidence of her father-in-law P.W.6 Bhiku Tupe, it is seen that prosecutrix was 18 years of age at the time of incident. Bhiku Tupe has stated that the marriage of his son Siddheshwar with the prosecutrix took place about three years prior to the incident. He has further stated that at the time of marriage, his daughter in law Vijaya Tupe was 16 years old. From the evidence of Bhiku Tupe, it is clear that prosecutrix was over 18 years of age at the time of incident.

9. It has come on record that there was love affair between appellant no.1 Nana and the prosecutrix. The prosecutrix has also admitted that whenever

appellant Nana used to call her, she used to visit his house. It has come on record through evidence of Investigating Officer P.W.12 A.P.I. Sudhakar Kharbas that prosecutrix had stated to him that she was having love affair with Nana. It is the case of the prosecutrix that on 2nd November, 1993 at about 7.30 a.m., appellant Nana called her at his house and asked her to come the his house on the next day at 5 a.m. It is the specific case of the prosecutrix that at that time, appellant Nana threatened her that if she did not come on next day at 5 a.m. he would drag her from her house in the presence of her family members. However, this statement of the prosecutrix is an omission and the Investigating Officer has admitted that no such version about threat was stated to him by the prosecutrix. From this, it is clear that on 3rd November, 1993 at about 5 a.m. when the prosecutrix went to the house of appellant Nana, she did so of her own accord without any threat being administered to her. It is further clear that she went there as she had love affair with Nana and she wanted to go away with him to Pune. The prosecutrix had willingly left her matrimonial home of her own accord. From the evidence of Bhiku Tupe, it is

clear that the prosecutrix was over 18 years of age at the time of incident, however, even assuming that the prosecutrix was a minor at the time of incident, it is clear that she had sufficient understanding and she had left her matrimonial house of her own accord on account of her love affair with appellant Nana.

10. From the evidence on record, it is clear that the prosecutrix accompanied Vilas voluntarily and wilfully. This is seen from the fact that she had travelled double-seat on bicycle from village Alsunde to Karmala which is 23 kms. away. The prosecutrix has not raised any hue and cry or sought help and infact, she had happily accompanied Vilas sitting double-seat on his bicycle. At Karmala, appellant Vilas left the prosecutrix near Naka and he went to bring a bag. If prosecutrix did not want to accompany Vilas, she would have run away from the said place when she was left alone at Naka. However, she has not done so and she continued to wait for him and went with Vilas to Karmala. From village Karmala, Vilas and the prosecutrix went to different places like Pothare, village Jamkhed and then to Ahmednagar. They went to these places by

various transport services like jeep etc. The prosecutrix met many persons on the way, however, she did not make any complaint to anyone at any time. At Ahmednagar also, appellant Vilas asked the prosecutrix to wait and he went to meet some persons. In that period also, the prosecutrix made no attempt to run away. Thereafter, Vilas returned and both of them went to see a movie. This conduct on the part of prosecutrix also shows that she was not averse to the company of Vilas. Thereafter, prosecutrix went with Vilas to village Ashti. At Ashti Vilas told prosecutrix to wait at S.T.stand while he went to find out some accommodation. The prosecutrix continued to wait at S.T. stand for Vilas for two hours and in the said period also, she made no complaints to anyone nor she tried to go back to her village or seek help from anyone. Thereafter, Vilas and prosecutrix came back to Karmala where they stayed in one room at night. From the evidence on record and the conduct of the prosecutrix, it is clear that prosecutrix willingly and voluntarily accompanied Vilas of her own accord. It is also clear that she had no objection to being in the company of Vilas and to going away with him to various places. From this, it is clear that no

offence under Sections 366-A and 109 of IPC is made against Vilas.

11. The appellant Vilas has also been charged for the offence under section 392 of IPC for robbing the gold earrings of the prosecutrix. However, on perusal of the evidence of prosecutrix, it is seen that she herself willingly and voluntarily handed over her gold earrings to Vilas so that the earrings could be sold and some money could be raised. In view of the fact that she herself had handed over her earrings willingly to appellant Vilas, no offence under Section 392 of IPC can be said to be made out against appellant Vilas.

12. Appellant Vilas has also been charged for the offence under Section 376 of IPC. It is the case of the prosecutrix that when Vilas came back to village Karmala, both of them resided in one room at night and during the said period, Vilas committed rape on her. The prosecutrix has produced her petticoat as well as bed sheet to substantiate her story of rape by Vilas on her. However, this petticoat and bed sheet have not been sent by the prosecution to the Chemical Analyst. Looking to the evidence and

history given by the prosecutrix that whenever Nana used to call her she used to go to his house and she had intercourse with Nana on number of occasions so also she had sexual intercourse with accused Kishan Ghatge on number of occasions and looking to the conduct of the prosecutrix in going away with Vilas and accompanying him to various places without any complaint, it appears that intercourse if there was any, was with the consent of the prosecutrix. From the evidence of prosecutrix, it appears that when appellant Vilas had forcible intercourse with her, she did not raise any hue and cry nor had she put up any resistance. After the incident of rape also, she did not make any attempt to run away but she continued sleeping in the same room with Vilas and on the next day morning at about 6 a.m. it was appellant Vilas who woke her up and thereafter took her to another place. There also the prosecutrix willingly accompanied him and went to another place i.e. to the house of one Langdya. At the house of Langdya, prosecutrix did not make any complaint to anyone though she was meeting other family members of Langdya including wife and daughter of Langdya. Infact, she used to attend natures call at public place while she was at the house of Langdya. It is

pertinent to note that Vilas left her at the house of Langdya and had gone to his house. Prosecutrix resided in the house of Langdya for about 2 to 3 days after the incident of rape. However, she did not make any complaint against Vilas to any person including anyone from the family of Langdya. From all this, it is clear that the sexual intercourse took place with the consent of prosecutrix. In this view of the matter, appellant Vilas is entitled to the benefit of doubt.

13. For the reasons stated above, I feel that this is a fit case wherein the appellants should be extended benefit of doubt.

14. In the result, the appeal is allowed. The convictions and sentences of both the appellants as imposed by the learned Additional Sessions Judge, Solapur by judgment and order dated 6th December, 1994 in Sessions Case No. 17 of 1994 are set aside. Both the appellants are acquitted therein. Fine amount if any paid by the appellants, be refunded to the appellants. The appellants are on bail. Their bail bonds shall stand cancelled.

[V.K.TAHILRAMANI.J]

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.15 OF 1995

Office Notes, office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders

Mr.T.E.Mane,Advocate for Appellants
Shri.A.S.Shitole, A.P.P. for State

CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : SEPTEMBER 9, 2004

. For the reasons mentioned separately in the judgment, the following order is passed:

. In the result, the appeal is allowed. The convictions and sentences of both the appellants as imposed by the learned Additional Sessions Judge, Solapur by judgment and order dated 6th December, 1994 in Sessions Case No. 17 of 1994 are set aside. Both the appellants are acquitted therein. Fine amount if any paid by the appellants, be refunded to the appellants. The appellants are on bail. Their bail bonds shall stand cancelled.

(V.K.TAHILRAMANI,J.)